No. 97.

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JAMES H. MCKENNEY,
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Supreme Court of the United States.

Ety. of Pease v. P. C.

OCTOBER TERM, 1900.

Number 97.

Filed Nov. 9, 1900.

MICHAEL F. DOOLEY, AS RECEIVER OF THE FIRST NATIONAL BANK OF WILLIMANTIC, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

JAMES PEASE.

Brief for the Plaintiff in Error.

ABSTRACT OR STATEMENT OF THE CASE.

FIRST HEAD: Nature of the Action.

Error to the Court of Appeals for the Seventh Circuit, bringing up a judgment of that court which affirmed a judgment of the Circuit Court in favor of the defendant below. The action was trespass by the receiver of the First National Bank of Willimantic, Connecticut, against the sheriff of Cook County, Illinois, to recover for the taking by the latter of certain silk under attachments sued out by certain creditors of the Natchaug Silk Company, a Connecticut manufacturing corporation.

The plaintiff in error claimed to own the silk by virtue of a transfer of it made by him by one Chaffee, the president and general manager of the Natchaug Company.

A jury trial was waived by stipulation, and the trial court—Judge Grosscup—made a general finding of not guilty, and a large number of special findings of facts.

The Circuit Court of Appeals affirmed the judgment entered upon the finding of not guilty—holding:

1. That Chaffee's attempted transfer of the silk was not good, because not authorized by the directors.

2. That the transfer was void under the law of Illinois, which "will not permit the owner of personal property to "sell it and still continue in possession of it."

SECOND HEAD: Findings as to the Transfer.

4. The goods in controversy in this case belonged, prior to April 25, 1895, to the Natchaug Silk Company, a Connecticut corporation.

6. The Natchaug Silk Company was originally organized on the 25th day of October, 1887, under the provisions of the laws of the State of Connecticut, then in force, authorizing and regulating the formation of stock corporations, and subsequently on the 12th day of June, 1889, a special act of the assembly of the State of Connecticut was passed in and by which it was declared that said Natchaug Silk Company should have and enjoy its corporate franchise and all the rights and privileges in said act granted for the purpose of manufacturing and dealing in all kinds of silk, cotton, mohair, wool and all articles composed wholly or in part of silk, cotton, leather, wool or other substance and to do such other things as were incident to the prosecution of said business and to exercise such mercantile powers as might be convenient and necessary for the successful prosecution of said business. Said act further provided that the stock, property and affairs of said corporation should be managed by its directors, a majority of whom, when convened in accordance with the by-laws, should constitute a board for the transaction of business, and that the president and directors should have power to appoint or employ from time to time a secretary, treasurer and such other officers, agents, mechanics and laborers as they might deem necessary and proper. The act further provided that the then existing by-laws of said corporation should continue in force until the same should be altered or repealed by a vote of the stockholders, and that said stockholders should have power to alter or repeal said by-laws and to make or establish such other by-laws, rules

and regulations not inconsistent with the laws of said State or of the United States as they might deem expedient for the management of the affairs of said corporation.

The third by-law adopted by the corporation on the 29th day of October, 1887, is as follows:

"The president shall preside at all meetings of the stockholders of said company when present, and in his absence the meeting shall be called to order by the secretary and a president *pro tem.* be appointed. He shall also perform all duties especially required of him by the statute laws of this State, but his charge of the executive business of the company shall be subject to the control of the directors."

At the annual stockholders' meeting on the 3rd day of February, 1891, the following amendment to the by-laws was adopted:

"The board of directors shall annnally elect a general manager, who shall have entire charge of the business and affairs of said company, subject to the order and approval of the board of directors."

The foregoing by-laws continued in force down to the time of the suspension by the corporation of its business and the appointment of its receiver.

Said two by-laws and said provisions above stated in the said act of the assembly of Connecticut are the only provisions of the charter of said corporation or of its by-laws necessary to be considered in determining the powers of its president or general manager.

7. On said 25th day of April, 1895, J. D. Chaffee was the president and acting general manager of said corporation and had been such president and acting general manager for more than two years prior thereto. Said Chaffee as such president and acting general manager had had entire charge of the current business and affairs of said corporation as a going concern and within the field of its ac-

tivities as a going concern and had been permitted by its board of directors to manage as he saw fit the said current business and affairs of said corporation as a going concern, as aforesaid, except that until about the 15th day of April, 1895, one O. H. K. Risley, a member of the board of directors of said corporation who was likewise cashier of said First National Bank of Willimantic had had charge of the financial affairs of said corporation and the borrowing of money for said corporation, on which last-mentioned date said Risley died at Willimantic, in the State of Connecticut, which was the principal place of business of said corporation, and except that said Chaffee during the time he was president and general manager at various times consulted the directors in regard to hiring an extra office outside the mill and in regard to *hiring an extra office outside the mill and in regard to* insuring the accounts of the company in a liability insurance company and in regard to purchasing or mortgaging of real estate and in regard to the policy to be pursued when strikes arose among the employés in regard to reducing wages.

8. The said First National Bank of Willimantic had, as a national banking association aforesaid, been engaged for many years in the business of banking under the laws of the United States at Willimantic aforesaid, and continued to carry on said banking business until said 23rd day of April, 1895, on which date, it having become insolvent, said plaintiff was appointed as its receiver as aforesaid. At the time of such appointment of the plaintiff said Natchaug Silk Company was indebted to said First National Bank of Willimantic to an amount exceeding $200,000 for moneys theretofore loaned by said First National Bank of Willimantic to said Natchaug Silk Company to enable said Natchaug Silk Company to carry on its said business, no part of which said indebtedness has ever been paid.

9. Prior to or about the time of his appointment as such receiver the plaintiff requested of said Chaffee, as president and general manager of said Natchaug Silk Company, that said Natchaug Silk Company should give security for the payment of its indebtedness to said First National Bank of Willimantic, and said plaintiff then and there told said Chaffee that unless said security was given he, the plaintiff, would close said silk company up.

10. Immediately thereafter said Chaffee came to the city of Chicago, together with one Solomon Lucas, an attorney-at-law who had been employed by the plaintiff to look after the interests of said First National Bank of Willimantic, and executed in the name of said Natchaug Silk Company and delivered to said Lucas on behalf of the plaintiff a bill of sale of the goods and chattels described in the plaintiff's declaration, together with certain other goods and chattels which at the time of the execution of said bill of sale were owned by said Natchaug Silk Company, being the stock of goods owned by said Natchaug Silk Company and then in the store known as numbers 213 and 215 Fifth avenue in the city of Chicago, Illinois, which said bill of sale was and is in the words and figures following, to wit:

"Know all men by these presents, that the Natchaug Silk Company, of the town of Windham, in the county of Windham and State af Connecticut—party of the first part, for and in consideration of the sum of twenty thousand dollars, lawful money of the United States of America, to it in hand paid at or before the ensealing and delivery of these presents, and divers other good and valuable considerations received of Michael F. Dooley, as receiver of the First National Bank of Willimantic of Connecticut of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and delivered, and, by these presents, do grant, bargain, sell and deliver unto

the said party of the second part, all the following goods, chattels and property, to wit:

"The stock of goods owned by the said Natchaug Silk Company and now in the store known as Nos. 213 and 215 Fifth avenue in the city of Chicago, in the State of Illinois, said stock of goods are silk goods and consists of dress goods, lining, braids, fish-lines, sewing silk and buttons.

"To have and to hold the said goods, chattels and property unto the said party of the second part, his heirs, executors, administrators, successors and assigns, to and for his own proper use and behoof, forever.

"And the said party of the first part do vouch itself to be the true and lawful owner of the said goods, chattels, and property and had in itself full power, good right, and lawful authority to dispose of the said goods, chattels and property, in manner, as aforesaid: And it does for itself and its successors, covenant and agree to and with the said party of the second part, to warrant and defend the said goods, chattels and property to the said party of the second part, his successors in office, and assigns, against the lawful claims and demands of all and every person and persons whomsoever.

"In witness whereof, it has hereunto set its hand and seal the twenty-fifth day of April, in the year one thousand eight hundred and ninety-five by J. Dwight Chaffee, its president duly authorized in its name and behalf to execute and deliver this instrument at the city of Chicago, State of Illinois.

THE NATCHAUG SILK CO., [SEAL.]
By J. D. CHAFFEE, Pres't.

Sealed and delivered in the presence of—
H. L. STANTON."

At the time of the execution of said document said silk company was indebted to said attaching creditors in the amounts above specified.

15. The Natchaug Silk Company was long prior to and during April, 1895, hopelessly insolvent and this fact was well known to Chaffee, its president.

18. Chaffee was not vested with authority to make this transfer by the charter of the company nor by the by-laws, nor by any action of the board of directors, nor was his act ever ratified by the board of directors or by the company in any manner unless the facts hereinbefore and hereinafter stated as a matter of law constituted such ratification. He had never had authority vested in him at any time by the company to make this transfer or to make similar transfers unless the facts hereinbefore and hereinafter stated, as a matter of law, conferred upon him such authority. He had never made a transfer similar to this prior to starting on his trip beginning April 22, 1895, on which trip he purported to make the transfer in controversy.

20. The directors of the silk company on being told by Lucas, who was Dooley's attorney, that it was essential that they should ratify Chaffee's act in making the supposed transfer, refused to do so and took no action whatever in regard thereto.

21. Chaffee had never during the business career of the company done any act in behalf of the company that would lead the bank or any one else to suppose that he had been given the power by the company to dispose of its assets by way of preference in case of impending dissolution.

32. After the appointment of said Hayden as receiver and on or about the 29th day of April, 1895, said Chaffee met in the office of said Natchaug Silk Company at Willimantic with all of the directors of said corporation who

were then living and were within the State of Connecticut, being three in number besides himself, the entire board of directors consisting of six members of whom one, to wit: said Risley, was dead, and another was absent from the State. At said meeting said plaintiff and said Lucas were also present and said Chaffee reported to said directors present at said meeting the making of said bill of sale of said goods in Chicago to the plaintiff above mentioned, and requested them to ratify the same, but said directors declined to take any action whatever in regard thereto, and neither expressed an approval nor disapproval of the act of said Chaffee in making said bill of sale. On the same day said Chaffee informed said Hayden of the making of said bill of sale, but said Hayden took no action in regard thereto, and neither he, said Hayden, nor the board of directors of said silk company took any action whatever with respect to the making of said bill of sale down to the time of the levy of the writ of attachment hereinafter mentioned.

THIRD HEAD: Findings as to the Possession.

11. Said store had for several years prior thereto been operated by said Natchaug Silk Company as a store for the sale to dealers of its manufactured goods through one H. L. Stanton, who down to said April 25, 1895, had acted as its agent for that purpose, and at the time said bill of sale was executed and delivered by said Chaffee to said Lucas said Chaffee directed said Lucas to have the said goods that were included in said bill of sale sold and the proceeds of such sale applied by said plaintiff as a payment upon the indebtedness of said Natchaug Silk Company to said First National Bank of Willimantic.

12. On the morning of April 26, 1895, an attorney employed by said plaintiff, called at the store, purported to take possession of said goods in the name of the plaintiff, employed said H. L. Stanton as agent of the plaintiff to sell said goods and remit the proceeds of such sales to the plaintiff, and took from said Stanton a receipt stating that he, said Stanton, had received said stock of goods from the plaintiff and was to hold the said stock as custodian and agent for the plaintiff and subject to the plaintiff's directions. Immediately thereafter said Stanton caused the said stock of goods to be insured in the name of the plaintiff, and opened a new set of books for the purpose of keeping an account of the sale and disposition of said goods and of the expenses of said Stanton in and about the making of such sale, and also made an inventory of the said goods and delivered the same to the said attorney for the plaintiff. From that date said Stanton understood himself to be acting solely as the agent of the plaintiff. A portion of the said stock of goods was sold by said Stanton to various persons to whom the said goods were billed in the name of the plaintiff and the proceeds of said sales amounting to about $7,000, were received by said Stanton and placed to the credit of the plaintiff. No change was made from April 25, 1895, until after May 20, 1895, in the sign on the outside of said store, which signs were "Natchaug Silk Company."

14. After the making of said bill of sale there was no change in the possession of the goods other than as above named, but they remained in the custody of the same persons who had theretofore been in charge of them for the silk company and they were apparently in the possession of the silk company so far as appeared to the public and were sold in the same way as theretofore down to the day of the attachment. There was no change in the title to or possession of said goods which was visible, open or notori-

ous down to the date of the attachments, unless the facts hereinbefore and hereinafter specifically stated did, as a matter of law, constitute a visible, open and notorious change of possession.

22. The signs of the Natchaug Silk Company on the outside and inside of the store were not changed between April 24th and the time of the levy of the attachments.

23. There was nothing in the appearance of the store outside or inside to indicate that there had been any change in the title or possession to the goods on or after April 25th and until May 20th, the time of the attachment.

24. The same persons (being five or six in number) remained in the store performing, after the transfer to Dooley, apparently the same duties they had been performing prior to April 25th.

25. The salesmen were instructed not to inform the public nor customers of the transfer to Dooley and they did not do so, but all the goods that were shipped from said store were billed to customers in the name of the plaintiff and not in the name of the silk company.

26. Orders kept coming in addressed to the Natchaug Silk Company after April 25th, for several weeks, in all respects as they had come in prior to that and these orders were appropriated and filled by Stanton out of the stock in the store.

27. The office fixtures were not attempted to be transferred to Dooley but they were used in conducting the business after April 25th in all respects as before by Stanton in the sale of the goods.

28. Stanton's books of account and papers in relation to sales after April 25th, were all kept in a safe belonging to the Natchaug Silk Company and which had its name painted in large letters therein and which was standing in the store.

29. No advertisement was made of the transfer to Dooley

nor was any public notice given thereof, unless as a matter of law the facts hereinbefore and hereinafter stated constituted such public notice.

30. There was nothing to inform the public that any change had taken place in the ownership or possession of the goods between April 24, 1895, and the levy of the attachment on May 20, 1895, unless as a matter of law the facts hereinbefore and hereinafter mentioned constituted sufficient information to the public of such change.

31. The change of ownership was not open or visible or notorious unless as a matter of law the facts hereinbefore and hereinafter stated constituted open or visible or notorious change of ownership.

36. Said sheriff after levying the attachments hereinbefore mentioned retained possession of said goods until June 10, 1895, on which date, pursuant to an order of the superior court of Cook County, Illinois, in the said case of Harold F. Haddon, *et al.*, *vs.* The Natchaug Silk Company, *et al.*, hereinbefore mentioned on the chancery side of said court, said sheriff turned over the possession of said goods to Henry L. Stanton who had by said court in said cause been appointed receiver of said goods on June 8, 1895, and said Stanton thereafter as receiver sold said goods pursuant to the orders of said court in the usual course of business, retaining for that purpose the same employés he had retained when he was selling said goods for Dooley, and selling said goods in the same manner as he had been selling them for said Dooley.

BRIEF OF THE ARGUMENT.

I.

Chaffee's transfer was within his power and good.

It is the law in Connecticut that it is a corporation's right and it is its duty to pay a debt. The fact that it operates to prefer the particular creditor paid makes no difference. *Smith* vs. *Skeary*, 47 Conn., 47, the text of the opinion in which will be quoted presently.

With these matters in mind let us read the by-law:

"The Board of Directors shall annually elect a general "manager who shall have ENTIRE *charge of the business* "*and* AFFAIRS of said company subject to the order and "approval of the Board of Directors" (R. p. 63).

No exception is made as to the company's being a *not going* concern. Nor is the power limited to the time *while it is a going cancern.* Chaffee was to have ENTIRE charge of the "AFFAIRS" as well as the business of the company.

In *Lewis* vs. *Hartford Silk Manf. Co.*, 56 Conn., 25, there had been a mortgage of its real estate made by the corporation to the plaintiffs to secure anvances not to exceed $100,000. They had made advances to $151,000, and ginghams had been given them by the manager for the rest. The question was whether they could hold the ginghams *in addition* to the mortgage.

The court said (p. 37), by Judge Pardee, the whole Court concurring in *the opinion* (p. 40):

"On or about July 9th, 1885, T. F. Plunkett, the presi- "dent and principal business and financial manager of the "Silk Manufacturing Company, requested the plaintiffs "to make advancements to the company in addition to "those contemplated and secured by mortgage, and verb- "ally agreed that these should be secured by the mort-

"gage, by the ginghams previously and subsequently con-
"signed to them, and by the Flat Top Coal Company's
"stock pledged by Bartholomew. Requests for additional
"advancements were renewed from time to time by Plun-
"kett, and on some of the later occasions Bartholomew
"was present. Upon such requests and agreement the
"plaintiffs, between July 9th, 1885, and September, 1886,
"advanced the sum of $51,000 to the company. *There*
"*was no vote either of its stockholders or directors au-*
"*thorizing such borrowing or agreement. No such vote*
"*was necessary to make the acts of Plunkett binding*
"*upon the corporation.* Having made him its principal
"and general financial manager and agent, with no limit-
"ation upon his power, and having notified all persons
"concerned of such appointment, the company is
"bound by his act of borrowing for its
"benefit, and of pledging ginghams or any other
"personal property for repayment. He was
"clothed with power to borrow money for its necessary
"and proper uses from any person who would lend; to
"sell ginghams, and repay; or consign ginghams with
"leave to retain the proceeds; or use any other property
"for that purpose. And as in these matters in legal con-
"templation he was the corporation, he could bind it as
"effectually as it could bind itself by corporate vote when
"taking up money, by an agreement that payment should
"be secured by the previous mortgage, provided (in the
"interest of other creditors) the aggregate should not ex-
"ceed the extreme limit of $100,000. *Of course, a corpo-*
"*rate vote was necessary* to a valid mortgage by its finan-
"cial agent *of the real estate* of the Silk Manufacturing
"Company to the plaintiffs. *But all money or other*
"*personal property or rights therein, coming into its*
"*possession because of the mortgage security thus given,*
"*were at the disposal of its general, unlimited financial*

" *agent*, equally with any other personal property belong-
" ing to it. A corporate vote is not made necessary to the
" valid disposition of this right in personal property, be-
" cause of the mention of it in a sealed instrument.
" Therefore, if we should concede that, as against the plain-
" tiffs, the agreement between them and the Silk Manufac-
" turing Company constituted a valuable right in the pos-
" session of the latter, *nevertheless Plunkett had absolute*
" *power of disposal of this right for its benefit. He could*
" *exchange, sell, pledge or annul it by his individual*
" *action, at his discretion.* Presumably the agreement
" by the mortgagor to deliver and by the mortagee to re-
" ceive ginghams in payment was for the benefit of the
" latter, and although it has a place in the condition of
" the mortgage, they were under no obligation to see in it
" any limitation upon the power of the mortgagor's general
" financial agent thereafter to borrow, if they should be
" willing to lend, other and additional sums for its benefit,
" and make payment therefor in money, ginghams, or any
" other personal property. The purpose of the mortgagor
" was to give satisfactory security for the loan of $100,000;
" not at all to bar itself from borrowing other money, if a
" willing lender could be found.

" *As it is the company's duty always to pay its debts,*
" *the application of any of its personal property or rights*
" *in stock* AT ANY TIME *to that use by its accredited finan-*
" *cial agent, without limitation, is binding upon it.*"

Although not discussed in the opinion, it appeared in the case that all the ginghams had been given for past due debt, as it did in *Sherman* vs. *Fitch*, 98 Mass. 59.

II.—*But the transfer* HAD *the authority of the directors.*

In *Railway Companies* v. *Keokuk Bridge Co.*, 131 U. S. 371, the Court, speaking by Mr. Justice Gray, said:

P. 381—" When the president of a corporation

"executes, in its behalf, and within the scope of its "charter, a contract which requires the concurrence "of the board of directors, and the board, knowing "that he has done so, does not dissent within a rea- "sonable time, it will be presumed to have ratified "his act. *Indianapolis Rolling Mill* v. *St. Louis*, "*&c., Railroad*, 120 U. S. 256."

In *Fitzgerald Construction Co.* v. *Fitzgerald*, 137 U. S. 98, the Court, speaking by Mr. Chief Justice Fuller, said:

P. 109—"These instructions were justified under "the evidence. If the moneys were used to pay off "indebtedness of the company arising in the con- "struction of the road, and for work done under "proper authority, the transactions were in pursu- "ance of the authorized purposes of the corporation, "and occurred in its legitimate business. The execu- "tion of the paper could not be held to be in excess "of the powers given, and it was clearly the duty of "the directors to give contrary instructions if they "wished to withdraw the general management from "the president; and to disaffirm the action of their "agents promptly and at once if they objected to it. "*Indianapolis Rolling Mill* v. *St. Louis, &c., Rail-* "*road*, 120 U. S. 256; *Cresswell* v. *Lanahan*, 101 "U. S. 347."

The case of

Indianapolis Rolling Mill v. *St. Louis, etc., R.R.*, 120 U. S. 256,

was this: There was a contract by which defendant bought of plaintiff ten thousand tons of iron rails to be delivered between June and October. On the 4th of October drafts to the amount of $54,000, part payment for the iron delivered, were due, and the agent of defendant agreed to pay them, if the plaintiff would make a release for the

balance of the contract. Such a release was signed "Indianapolis Rolling Mill Co., by J. Thomas, treasurer," 8 February. Thomas signed by the direction of one Jones, who was both president and superintendent. The by-laws declared (p. 283) that the superintendent "shall have "charge of the works, property and operations of the "company, and shall employ all operatives and certify "all wages due and other expenses to the secretary, "* * * and shall, with the approval of the president, "buy and sell material and make all contracts for the "same, and for work," etc.

Another by-law declared that "the superintendent and "all other persons shall in all cases be subject to the "control of the board of directors in everything where the "board shall elect to exercise such control."

The trial court found "that after the return of Mr. "Thomas from the City of New York to Indianapolis, "some time in March, there was a meeting of the board "of directors of plaintiff, at which the validity of the "release executed by Mr. Thomas was discussed; but the "records do not show that at that particular meeting any "definite action was taken; that the directors at that "meeting did in fact agree to submit the question to "counsel of plaintiff, let him investigate it, and then "act upon his advice; that about two years after this meet- "ing, and a year and a half after this suit was commenced, "a *nunc pro tunc* entry was made upon the records of "plaintiff of the proceedings of plaintiff's board of direc- "tors, which showed a repudiation upon the part of the "board of directors of the release so executed, and that "this suit was originally instituted in this Court at the "first term thereof after the execution of the release."

"The Court, speaking by Mr. Justice Miller (p. 259):

"We concur with the Court below that on the facts "thus stated the release was a valid release. Its execu-

"tion was of that class of business which, under the by-
"laws of the corporation and the course of business
"between these parties, had been confided to the presi-
"dent and superintendent, both of which offices were
"held by Mr. Jones. The direction given by Mr. Jones
"to the treasurer, Mr. Thomas, both of whom were also
"directors in the corporation, was within the line of his
"authority. He had under this same authority without
"any express resolution or direction of the board of
"directors, made the contract on which this suit is
"brought; and it would seem that, not being under seal,
"a simple contract concerning the ordinary business of
"the company, the same power which enabled him to
"make it was sufficient to enable him to release it, unless
"the power had been withdrawn.

"Another principle leads to the same result. These
"by-laws show that the board of directors retained the
"power in their hands to control the president and super-
"intendent in any transaction, whenever it was thought
"proper to do so. This matter was reported to the
"directors; they had a meeting upon the subject some
"six weeks after the whole thing had been consummated,
"and after they had received the benefit of the release by
"the payment of their drafts. The rule of law upon the
"subject of the disaffirmance or ratification of the acts of
"an agent required that if they had the right to disaffirm
"it they should do it promptly, and if after a reasonable
"time they did not so disaffirm it, a ratification would be
"presumed. In regard to this it appears that the board,
"when notified of what had been done by their agents,
"did not disaffirm their action at that time, but that the
"act or resolution of disaffirmance was passed about two
"years after notice of the transaction, and that if the suit
"brought in this case can be considered as an act of dis-
"affirmance, it came too late, as it was commenced some

" *six months after they had knowledge of the release.*
" As was stated in the somewhat analogous case of the
" *Twin Lick Oil Co.* vs. *Marbury*, 91 U. S., 592, 'the
" 'authorities to the point of the necessity of the exercise
" 'of the right of rescinding or avoiding a contract or
" 'transaction as soon as it may be reasonably done, after
" 'the party, with whom that right is optional, is aware
" 'of the facts which gave him that option, are numerous.
" '* * * The more important are as follows: *Badger* vs.
" '*Badger*, 2 Wall., 87; *Harwood* vs. *R.R. Co.*, 17 *id.*, 78;
" '*Marsh* vs. *Whitmore*, 21 *id.*, 178; *Vigers* vs. *Pike*, 8 Cl.
" '& Fin., 650; *Wentworth* vs. *Lloyd*, 32 Beav., 467; *Fol-*
" '*lansbee* vs. *Kilbreth*, 17 Ill., 522; S. C., 65 Am. Dec.,
" '691.' See also *Gold Mining Co.* vs. *National Bank*,
" 96 U. S., 640; *Law* vs. *Cross*, 1 Black, 533.

And the same is the law of Connecticut.

In

Lewis vs. *Hartford Silk Manf. Co.*, 56 Conn., 25,

already quoted, the court said, p. 39: "Moreover, upon
" the record there was such corporate ratification of
" Plunkett's acts as would have established them in
" the absence of any previous authority. On June 30th,
" 1885, the plaintiffs had advanced to the Silk Manu-
" facturing Company the full sum of $100,000, for security
" of which the mortgage was given, and by mistake
" $6,000 in excess. On January 1st, 1886, they gave the
" company written notice that they had advanced ad-
" ditional sums to it and had applied towards the pay-
" ment therefor the proceeds of the ginghams which it
" had consigned to them, and which were referred to in
" the condition of the mortgage. The company received
" this notice and made on its own books a like credit upon
" a like account. Silence then imposes silence now upon
" it in reference to this transaction. The result is an

"actual application of the proceeds of the ginghams by "the plaintiffs to the repayment of the last advances with "the knowledge and assent of the Silk Manufacturing "Company."

The above is the general and well-settled doctrine,

But

it is equally well settled that the rule is the same where the transaction is made known to the directors INDIVIDUALLY *and not at a meeting.*

In *Creswell* v. *Lanahan*, 101 U. S. 437, the Court, speaking by Mr. Justice Swaye, said:

P. 352—"The transaction, like all others, *was* "*made known to the trustees individually*, and they "never objected. This intelligent acquiescence was "a binding ratification. *Kelsey* v. *National Bank* "*of Crawford County*, 69 Pa. St. 426; *Hilliard* v. "*Goold*, 34 N. H. 230; *Christian University* v. *Jor*"*dan*, 29 Mo. 68; *Sherman* v. *Fitch*, 98 Mass. 59.

"The arrangement was first challenged after the "company became bankrupt and went into the hands "of appellants.

"The company was concluded and the appellants "can be in no better position."

And the cases cited fully bear out the proposition.

Kelsey v. *The Nat. Bk. of Crawford County*, 69 Pa. St. 426:

(Headnote)—"Upon the discovery of the robbery of a "bank, a minority of the directors and the cashier met "with a detective in the bank; the cashier with the "advice of those directors offered a reward for the money "and the thief, and sent to different places telegrams "containing the offer; all the directors lived in the same "place; they did not disavow the cashier's act; the de"tective arrested the thief and obtained the money. "*Held* to be evidence of ratification by the bank."

And the court, speaking by Williams, *J.*, said:

(p. 430.) "Nor was it necessary, in order to bind the "bank by their acquiescence, that notice should have "been given to the directors, when sitting in their official "capacity as a board. If they were personally cog- "nizant of the offer made by the cashier, it was their "duty to call a meeting of the board and disavow the act, "if they were unwilling that the bank should be bound "by it."

Sherman v. *Fitch*, 98 Mass. 59:

The president of the Northampton Sugar Refining Company mortgaged in the name of the company all the machinery in its sugar house and its "Refinery" to Fitch to secure a precedent debt of eighteen thousand dollars, which the company owed Fitch. This was known to all the directors but one, "and was approved by them, pro- "vided their neglect to make any objection to the same "can be construed as an approval."

The court speaking by Wells, *J.*, said:

(p. 64.) "The remaining consideration relates to the "authority of Sampson to execute the mortgage in behalf "of the corporation. It is not necessary that the au- "thority should be given by a formal vote. Such an act "by the president and general manager of the business "of the corporation, with the knowledge and concurrence "of the directors, or with their subsequent and long- "continued acquiescence, may properly be regarded as the "act of the corporation. Authority in the agent of a "corporation may be inferred from the conduct of its "officers, or from their knowledge and neglect to make "objection, as well as in the case of individuals. *Em-* "*mons* v. *Providence Hat Manufacturing Co.*, 12 Mass. "237; *Nelledge* v. *Boston Iron Co.*, 5 Cush. 158; *Lester* v. "*Webb*, 1 Allen, 34. The absence of one of the directors "in Europe could not deprive the corporation of the

" capacity to act and bind itself by the act of the officers " in active charge of its affairs."

Hilliard v. *Goold*, 34 N. H. 230:

Statute required rates of fare to be established by " every railroad *corporation*."

Rates in this case were established by the president. There was no proof of any action by the directors, either way.

Christian University v. *Jordan*, 29 Mo. 68.

A statute of Missouri provided that anybody receiving and paying out bank notes of less denomination than five dollars could not recover on contracts. The Christian University sued Jordan on a contract. Jordan pleaded in bar that it had received and paid out bank notes of less than five dollars—and proved that one Hatch, the treasurer of the University had done so. It was proved that there was no direction " upon the part of said corporation " to Hatch, " as to what kind of money he should receive or " pay out."

III.—*The fact of the appointment of the receiver had no effect upon Fenton and Wilson in the way of their being directors, and gave them no excuse for acting as they did: that is, declining to act as directors at all.*

Of course the appointment of the receiver affected only the property of the company which was in Connecticut, and without a dissolution of the company or an injunction enjoining the directors from acting, their duties as well as their powers as directors continued.

The common law and the special statutes of Connecticut applicable to this matter were as follows:

In *Smith* vs. *Skeary*, 47 Conn., 47: " A corporation " transferred a quantity of its goods to two of its direc- " tors, to be sold by them and the proceeds applied in

"payment of a joint claim of large amount which they "had against it. The corporation was in fact insolvent" (p. 47). Proceedings in insolvency were not begun within sixty days.

The court said (p. 54), by Judge Carpenter, the whole court concurring:

"We are unable to discover any principle of law which "renders the transaction fraudulent. *The corporation had "a right, and it was its duty, to pay this debt. These "creditors had a perfect right to receive pay in money or "goods*, and the fact that they were stockholders and "directors did not modify or abridge that right, so long "as there was no actual fraudulent intent. *The fact, if "it be a fact, that it operated to prefer these creditors, is "not sufficient at common law to stamp it as fraudulent, "for the common law favored the vigilant, and a credi-"tor might lawfully obtain a preference.* It does not "become fraudulent under our insolvent laws, because no "proceedings in insolvency were instituted in due time, "so that the case cannot be brought within the operation "of those laws. *The consideration was good and "adequate*, so that there is no badge of fraud in that re-"spect."

Section 501 of the General Statutes of Connecticut was and is as follows:

"Sec. 501. All transfers of property by any person in "failing circumstances, with a view to insolvency, shall "be void, unless made by a written assignment for the "benefit of all creditors in proportion to their respective "claims, embracing all the property of the assignor, "except such as is exempt from execution, real estate "situated out of this State, and, in case of sole assignors, "one hundred dollars in cash, and lodged for record in "the office of the Court of Probate having jurisdiction."

"Sec. 504. No transfer of property otherwise valid shall

"be made void by any provision of this chapter, unless "within sixty days after such transfer proceedings shall "be instituted for the purpose of carrying the estate of "the party making such transfer into settlement as an "insolvent estate,——

Sections 501 and 504 are parts of Chapter LII. and Title 13 of the General Statutes.

Title 13 is entitled "Courts of Probate; Their Powers "and Jurisdiction," and consists of fourteen chapters—XLII. to LV., inclusive—and two hundred and nineteen sections—430 to 648, inclusive.

Chapter XLII. is entitled "General Provisions." It consists of sixteen sections—430 to 445, inclusive—and provides for the organization and powers of the Courts of Probate; the election of the judges of those courts and such matters.

Chapter LII. is entitled "Insolvent Debtors" and consists of thirty-five sections—501 to 535, inclusive.

Sec. 501 is the section above quoted—"All transfers of "property by any person in failing circumstances with a "view to insolvency, shall be void unless," &c.

Secs. 501 and 502 provide for the "lodging" by the "assigning debtor" of an assignment for all his creditors in the "office of the Court of Probate," and expressly and in terms applies to corporations.

Sec. 504 is the section already quoted, which provides that "no transfer of property otherwise "valid shall be "made void by any provision of this chapter, unless "within sixty days after such transfer proceedings shall "be instituted for the purpose of carrying the estate of "the party making such transfer into settlement as an "insolvent estate."

Sec. 507 provides for compulsory proceedings in insolvency by petition by a creditor to the Court of Probate,

in which proceeding the Court of Probate appoints a trustee.

Sec. 511. The Court of Probate to appoint a trustee under the voluntary assignment made according to Section 501.

Sec. 523. Commencement of proceedings in insolvency dissolves all attachments and all levies of executions made within sixty days next preceding

Sections 511–533 relate to the powers of above "trustees" and the settlement of the insolvent estate by them; and particularly mention (Sec. 519) "trustees in insolvency "of the estate of corporations."

Section 524 is as follows:

Page 132: "SEC. 534. *All proceedings for the settlement of the estate of insolvent, debtors shall be had "in the Court of Probate of the district* in which such "debtor or one of such debtors resides, *except that in the "case of copartnerships and corporations* all such proceedings shall be had in the Court of Probate of the district within which such copartnership or corporation had "its office or principal place of business. In case of a "non-resident debtor owning property within this State, "the proceedings shall be had in the district in which "such property, or any part of it, may be found situated. "*The date of the commencement of proceedings in insolvency shall be deemed to be that of the lodgment of the "assignment for record, or of the filing the petition for "the appointment of a trustee.*"

The foregoing are the statutory provisions in regard to proceedings in insolvency.

The following is the statutory provision for receivers of this sort of corporation:

TITLE XXX.

Private Corporations.

Chapter CXIX.

"Sec. 1942. The Superior Court in the county in "which any corporation, organized under the laws of this "State, has its principal place of business, may, as a "court of equity, on the application of any of its stock-"holders, wind up its affairs and dissolve it, *if said "Court shall find that said corporation has voted to "wind up its affairs, or abandoned the business for "which it was organized, and has thereafter neglected "within a reasonable time or in a proper manner to "wind up its affairs and distribute its effects among "its stockholders;* and for this purpose may, if it deem "it necessary, appoint one or more receivers of the estate "of said corporation, and limit a time for its creditors to "present their claims to such receivers, and direct public "notice thereof to be given; and all claims not presented "within such time shall be barred. Said receivers shall "allow all just claims against said corporation, collect its "debts, sell its property, and convert the same into "money, and report their doings to said court as it may "direct. Said court may, on complaint of any person "aggrieved by such doings, grant such relief as the nature "of the case may require; and it may make such orders "as to the doings of the receivers, their compensation, "and other expenses, and as to the payment of debts and "distribution of the effects of said corporation, as may be "just and conformable to law."

There are special statutes in regard to Insurance Companies, banks' and railroads, but the above is the only one which applies to this sort of corporation.

Insolvency is therefore not one of the grounds for the appointment of a receiver of a corporation by the Superior Court.

All insolvency proceedings must be in the Court of Probate.

I am informed that, in practice, if it is made to appear to the Superior Court after it has appointed a receiver that the corporation is in fact insolvent, the Court will permit a petition in insolvency to be filed in the Court of Probate; and that this has been frequently done on the suggestion of the Court itself, when it had been ascertained that the corporation was insolvent.

It thus appears that the whole subject of insolvency and the settlement of insolvent estates is left exclusively to the various Courts of Probate.

This further appears from a comparison of Chapter 69 of the Laws of 1895, with Section 523 of the General Statutes already referred to.

They are as follows:

"SEC. 523. The commencement of "proceedings in insolvency shall "dissolve all attachments and all "levies of executions not com- "pleted, made within sixty days "next preceding, on the property "of the insolvent debtor; but if "the property is subsequently taken "from the trustee, so that it cannot "be used for the benefit of the "creditors of the estate, or if the "trust shall be terminated by order "of the Court, said attachments and "levies of execution shall revive, "and the time from the commence- "ment of proceedings in insolvency "to the time when the trustee shall "be dispossessed of the property, or

PUBLIC ACTS CONN., 1895.

"CHAPTER XCVI.

"AN ACT concerning Receivers of "Corporations and Copartner "ships:

"The commencement of proceed- "ings for the appointment of a re- "ceiver of a corporation or a co- "partnership shall dissolve all "attachments and all levies of "executions, not completed, made "within sixty days next preceding, "on the property of such corpora- "tion or copartnership; but if the "property is subsequently taken "from the receiver, so that it can- "not be used for the benefit of the

"when such trust shall be terminated, shall be excluded from the computation in determining the continuance of the lien created by such attachment; but the attaching and levying creditors shall be allowed the amount of their legal costs, accruing before the time of the appointment of a trustee, which shall be paid as hereinafter provided, and in the order of such attachments and levies, if their respective claims shall, in whole or in part, be allowed by the commissioners."

"creditors of said corporation or said copartners, nor made subject to the orders of the court in the settlement of the affairs of said corporation or copartnership, or if the receivership shall be terminated by order of the court, pending the settlement of the affairs of the corporation or copartnership, said attachments and levies of execution shall revive, and the time from the commencement of such proceedings to the time when the receiver shall be dispossessed of the property, or the finding of the court that said property is not subject to the orders of said court, or when said trust shall be terminated, shall be excluded from the computation in determining the continuance of the lien created by such attachment; but the attaching or levying creditors shall be allowed the amount of their legal costs, accruing before the appointment of a receiver, as a preferred claim against the estate of said corporation or copartnership, if their respective claims upon which the attachments are founded shall in whole or in part be allowed.

"Approved: April 25, 1895."

Receivers of dissolved copartnerships are provided for by Sections 1313 and following General Statutes.

It is quite apparent that the framers of this act of 1895 considered a receivership *not* a proceeding for the settlement of an insolvent estate.

The complainants, and any other creditor, could have avoided the transfer by beginning proceedings in insolvency, in due time, in the Court of Probate.

No one, however, did so, and it follows that the transfer is saved by Section 504.*

II.

The sale was not void because of the facts found in regard to the possession.

Judge Grosscup did not put his decision upon this ground, so far as appears.

The reasoning of the Court of Appeals upon this subject is expressed in the following words:

"Another ground on which the sale was clearly invalid "is the finding of the Court that the sale was not fol- "lowed by an open or visible or notorious change of "possession or ownership, unless, as matter of law, the "the facts stated in the finding constituted sufficient in- "formation to the public of the change. The facts so "stated were evidentiary only, and, instead of being con- "clusive of publicity, tended rather to show intentional "concealment. They were certainly sufficient, even if "we were required to look into the evidence, to support "the finding of the ultimate fact. The sale was therefore "void under the law of Illinois, which 'will not permit "'the owner of personal property to sell it and still con- "'tinue in the possession of it.' Green *v.* Van Buskirk, "7 Wall., 139; Henry *v.* Locomotive Works, 93 U. S., "664; Martin *v.* Duncan, 156 Ill., 274; Harkness *v.* Rus- "sell, 118 U. S., 663: Pullman Car Co. *v.* Pennsylvania, "141 U. S., 18.

"It is urged that while the Federal courts follow the "rule of the State that a transfer of personal property, "where the vendor is permitted to remain in possession, "is fraudulent and void as to creditors, the Federal courts "are not bound to give heed to the opinions of the "supreme court of Illinois upon matters of fact, and that "what will constitute a sufficient change of possession "must necessarily be determined upon the facts of each

"case. That may be conceded: but the court here having "determined the fact against the appellant, whether "according to the weight of the evidence or not, the find- "ing, by the authorities already cited, cannot be re- "viewed."

The rule thus stated is not, in this case, violated. The owner of the personal property here did NOT "sell it *and* "STILL *continue in the possession of it.*"

There *was* an ACTUAL and *total change of possession.*

The question is whether the change was sufficiently notorious and visible—or rather whether, under the circumstances of this case, "sufficient" or *any* "information "to the public" was necessary.

The giving of the bill of sale and the actual change of possession took place on the 25th of April, 1895—in Chicago. On the 26th of April—*the next day*—the receiver was appointed in Connecticut, qualified and took possession (R., p. 14).

It is therefore utterly impossible that the public or anybody could have been deceived or injured, for the simple and conclusive reason that the Natchaug Company could no longer either borrow money or buy raw material; even if there were anybody who, under such circumstances, would have lent it money, or sold material to it on credit.

None of the cases cited by the Court of Appeals need consideration except *Martin* v. *Duncan*, 156 Illinois, 274, because, in all of the other cases, the vendor continued in possession.

Martin v. *Duncan* was this: Duncan being in possession of goods as agent of the vendor, *who was his brother*, the vendor made to him a bill of sale of them for an alleged debt for money loaned and for unpaid salary —with a covenant to reconvey provided the vendor paid the money in thirty days. The court held that the

question of good faith in the transfer was for the jury, and it is plain that it was, upon other grounds than the matter of possession. But the court beside this, *said* (156 Illinois, 280):

"When the known and previously recognized *agent* of "an alleged vendor *remains in possession*, the appear- "ance to the world is the same as though the vendor him- "self remained in possession, unless there are substantial "and visible signs of a change of title. (*Flanagan* v. "*Wood*, 33 Vt. 332.)"

The Court also cited a Missouri case—but as that was decided under the Missouri statute which required a "delivery" and "an actual and continued *change* of "the possession of the things sold" it does not apply. Nevertheless *in that case—Claflin* v. *Rosenberg*, 42 Mo. 439—it was said by the Court (p. 450) "There must be a "complete change of the dominion and control over the "property, and some act which will operate as a divesti- "ture of title and possession from the vendor, and a "transference into the vendee. This necessarily excludes "the idea of a joint or concurrent possession. It may not "be essential or indispensable that the goods should be "moved into a new or different house but there must be "some open, notorious, or visible act, clearly and une- "quivocally indicative of delivery and possession, *such as* "*taking an invoice*, putting up a new sign, or any other "reasonable means which would impart notice to a prudent "man that a change had taken place. The statute provides "that the change shall be actual and continued; it must, "therefore, be neither formal nor temporary; but where "the whole law has been complied with, we see nothing "to prevent the employment of the vendor to render "services in and about the property, in the same manner "as any other agent or employee."

It is quite plain that the facts here come within the

above language *for Stanton took an inventory (invoice) and delivered it to the attorney for the plaintiff;* opened a new set of books; billed all the sales which he made in the name of the plaintiff, and put the proceeds—some $7,000—to the plaintiff's credit—R., p. 14.)

There was not then and is not now any such statute in Illinois, as that Missouri statute; the statute applying being (§ 4 of Ch. 59; Starr & Curtis, Statutes 1885, p. 1196) as follows:

"§ 4. Every gift, grant, conveyance, assignment or "transfer of, or charge upon any estate, real or personal, "or right or thing, in action, or any rent or profit thereof, "made with the intent to disturb, delay, hinder or de-"fraud creditors, or other persons, and every bond, or "other evidence of debt given, suit commenced, decree or "judgment suffered, with like intent, shall be void as "against such creditors, purchasers and other persons."

In other words the statute of Elizabeth.

The Vermont case was the case of a hired man living on a farm with the debtor, who was also the owner. An attachment levied on cows on the farm; the hired man agreeing with the attaching creditor to become *his* hired man, and the debtor giving to the attaching creditor a lease of the farm, which was not recorded. But everything else went on as before, and to the outward eye, the debtor (former owner) was still in possession of the cows.

In *Warner* v. *Norton*, 20 How., 448, which was an Illinois case, the proof was that one Haskins had a hardware store and tinshop—and "that *while he was absent* "the business was conducted by one Atherton, his head "clerk, who employed the operatives and superintended "their work." That Haskins sold his whole stock to certain creditors, they cancelling his debts to them and giving notes to Haskins for the balance of the price agreed

on and "thereupon by way of putting the purchaser in "possession, Haskins, Anderson" (agent of the creditors) "and Atherton, being in the store room, Haskins got the "key of the outer door, and gave it to Anderson, and "Anderson gave the key and charge of the store and tin "shop to Atherton, who, up to that time had been carry- "ing on the business for Haskins, but then undertook to "act for Anderson.

"Anderson and Haskins left La Salle, and did not re- "turn until after the" goods had been attached by others (20 How., 457).

Haskins was then in "failing circumstances."

"Atherton continued to control the goods and business "as before, and to all appearances was doing so for Has- "kins; that sales were made to customers as formerly, "without notice to any one of the change of proprietors, "and, in some instances the bills and receipts of sales to "customers were made out in the name of Haskins. No "change was made in keeping the books; that the servants "and operatives about the store and tin shop continued to "work under the direction of Atherton, with no knowl- "edge of any sale, and supposing the business was being "carried on as formerly, and for the use of Haskins; but "it did not appear that any of these things were author- "ised by the plaintiffs" (Anderson) "or known to them; "and that this condition and course of things continued "until the goods were seized by the sheriff" (20 How., 458).

"The trial court charged that if the jury believe from "the evidence the sale was made for the purpose of hind- "ering, delaying or defrauding creditors, it was invalid "as against the defendant; and that whether the sale was "or was not fraudulent was a question of fact, to be de- "termined by the jury under all the circumstances of the "case. That if the sale were secret, and no means taken

12948

" to apprise the public of it, these were facts which threw " suspicion upon the transaction, but did not make the " sale fraudulent in law as against the defendant" (p. 458).

The Court, speaking by Mr. Justice McLean, said:

(p. 460.) " But the case before us is not similar to that " of Hamilton *v.* Russell. There was a change of pos- " session in the goods purchased by Anderson, by the de- " livery to him of the key of the outer door of the store- " house, which he delivered to Atherton, who had agreed " to continue in the business as the agent of the pur- " chasers. From the time of the purchase, Haskins had " no possession of the property, nor did he exercise any " acts of ownership over it. He was absent from La Salle " from the time of the sale until after the attachment was " laid.

" Now, whether this was a colorable delivery or not, " was a matter of fact for the jury, and not a matter of " law for the Court."

The reasons given for rule are as follows:

Towne's Case, 3 Co. 816.

" The donor continued in possession, and used them as " his own; and by reason thereof he traded and trafficked " with others, and defrauded and deceived them."

Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.

Flanagan v. *Wood*, 33 Vt., 332; the Vermont case cited in *Martin* v. *Duncan*, (156 Ill., 274).

" The reasons upon which our policy was founded are " admirably set forth by Judge Prentiss in *Weeks* v.

" *Weed*, 2 Aik. They are, first to diminish fraudulent " sales, in fact, by preventing the debtor from securing a " benefit to himself by depriving him of the possession of " the property; and secondly, to prevent the public from " being misled to give a false credit to the former owner " who, by continuance in possession after a sale would " appear to the world as the true owner."

The findings here establish the facts.

1. That the vendor could not deceive the public because of the possession of the goods.

2. That there could not have been any trust for the vendor.

3. And the delivery of possession could not have been colorable.

They therefore established the fact that the sale was not made with the intent to hinder and defraud creditors.

In addition to the statute of Illinois above cited there is this further statute—(§ 6 of Ch. 59; Starr and Curtis, Statutes, 1885, p. 1199).

" § 6. Every conveyance of goods and chattels on con- " sideration not deemed valuable in law shall be taken to " be fraudulent, unless the same be by will duly proved " and recorded, or by deed in writing duly acknowledged " or proved, and recorded as in the case of deeds of real " estate, or *unless possession shall really and* bona fide " *remain with the donee.*"

The judgment should be reversed.

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12949